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Banking & Financial Services

COVID-19 Stimulus, Low-Interest Rates May Trigger FDICIA Obligations for Banks

BY **KYLE KONOPASEK**

Banks previously not subject to the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) may soon find themselves with new reporting requirements. A culmination of factors, including COVID-19 relief efforts and stimulus programs, as well as historically low federal interest rates have dramatically increased the volume of assets held by banks. These assets may push banks over the $1 billion threshold for internal control testing requirements under FDICIA.

How We Got Here

Prior to COVID-19, the U.S. economy showed signs of growth and stability. Federal interest rates were low, which prompted more mortgages, auto loans and commercial lending from bank customers, which appear as assets on a bank's balance sheet.

COVID-19, while disruptive, also ended up increasing asset size for banks because the government loans provided under the Paycheck Protection Program (PPP) and now the second iteration of the program, PPP2, among other federal lending initiatives also counted as bank assets for financial reporting purposes (because banks serve as the intermediary between the government and the SBA loan applicant). The combination of low interest rates, a strong economy and the COVID-19 relief loans may be propelling many banks toward FDICIA requirements for the first time. For banks already over the $1 billion threshold, it's worth noting that FDICIA has additional requirements at $3 billion or more in total assets.

A FDICIA Refresher

FDICIA compliance for banks means that a bank must have a financial controls environment

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that adheres to a recognized control framework, such as COSO 2013. Generally, when evaluating these controls, one could refer to the concept of internal controls over financial reporting (ICFR), which is a common term/phrase in the financial statement audit space. The additional scrutiny on controls for banks under FDICIA is the equivalent of Sarbanes-Oxley (SOX) for public companies. Just as public companies are required to do for SOX, banks are asked to undergo a specific type of internal audit for FDICIA compliance to ensure that the financial reporting process and controls are in place and operating as intended.

Regulatory Climate

Generally speaking, banks must demonstrate compliance with FDICIA in the year after they've reached the $1 billion asset threshold. So, if on Dec. 31, 2020 a bank has $1 billion or more in assets, then it must demonstrate FDICIA compliance by Dec. 31, 2021.

Because of the disruption experienced in 2020, banks newly eligible for FDICIA will have a longer than normal grace period to undergo their FDICIA internal audit. The Federal Deposit Insurance Corporation is permitting banks that had $1 billion in consolidated total assets during its fiscal year ending in 2020 to elect to use the lesser of the consolidated total assets they had in place on Dec. 31, 2019 or consolidated assets as of Jan. 1, 2021 to determine applicability of FDICIA requirements for fiscal years ending in 2021. Essentially, the election would give banks that reached the $1 billion threshold during their 2020 fiscal year end an additional year to undergo the FDICIA internal control implementation and testing requirement.

What Banks Should Do If They're On the Brink

Banks between $850 million and $1 billion should be actively planning for their approach to FDICIA internal control compliance. A reasonable time to begin the compliance process is 12-18 months out from when the compliance would be due.

To prepare for FDICIA compliance, banks will need to identify and design a system for ICFR and be able to demonstrate this control environment was operating effectively over the fiscal year. Evaluating the current internal audit committee or creating an audit committee will also be vital. All audit committee members must be independent of management teams. As best practice, and required for banks over $3 billion in assets, the audit committee should include members with banking or related financial management expertise, have access to their own outside counsel and not include any large customers of the institution as defined in FDICIA regulations.

Bank management must also assess risk and document control activities. A third-party internal controls expert can assist in the control environment review process prior to the FDICIA internal controls tests beginning.

It is important to plan thoroughly leading up to the testing, particularly given the time sensitivity of the new control obligations. A clear timeline can be established between you and the third-party controls expert who performs the FDICIA control design and tests of operating effectiveness. Quality assurances can also be tested at regular intervals prior to the FDICIA requirement period beginning. Through this process, banks can address any control deficiencies and evaluate the effectiveness of current systems.

While the compliance process can be complex and require extensive documentation, it provides a focused training opportunity for those in your organization who need to understand and refresh documentation strategies.

For more information, connect with this article's author, Kyle Konopasek, at 816.945.5512 and kkonopasek@cbiz.com.

Is Your Bank a Dinosaur of the Banking World?

BY **JAY MESCHKE, PRESIDENT, CBIZ TALENT & COMPENSATION SOLUTION**

As a former bank president and an executive search consultant for over 20 years now, I'm seeing a seismic shift occurring in client acquisition on the commercial side of banking.

Since the dawn of time, a bank's commercial business development efforts have primarily been tied to face-to-face contact by and between bankers and prospects. Calendars were packed with breakfast meetings, lunch meetings, golf games, charity events, Chamber of Commerce interactions, dinners, ball games, etc. Sound familiar?

Bankers who were successful commercial business developers were worth their weight in gold. They were highly sought after and hard to come by. Relationships that business developers accumulated over the years could be monetized by any bank. These individuals were rewarded as handsomely as any staff member in an institution.

In many cases, banks would team up a strong business developer with a competent credit officer in order to accommodate clients' needs in rapid fashion. Response time became highly important, just as important as the strong relationships held by the business developer.

If this picture describes your current style of commercial business development rather than a memory, your bank is in danger of becoming a dinosaur of the banking world. Much has changed in just the last five years on both sides of the coin – both buyer and lender.

Commercial Banks Need to Catch Up to Buyer Expectations

"Traditional" commercial banking decision makers (buyers) have moved on. Their "old-school" business development counterparts at banks are retiring in droves.

The buyer of commercial banking services today goes about things in an entirely different way. Millennials (or "Gen Y," currently between 25 and 40 years old) are moving into key managerial and C-suite roles. They are not necessarily interested in developing a deep, personal relationship with their banker. Instead of the breakfast, lunch, dinner, golf continuum, these clients and prospects base decision making on internet research, online references and a bank's website for ease-of-use and meaningful information.

No longer tethered to physical locations, buyers of commercial banking services value the same level of convenience and rapid response as they receive in their personal banking. They expect lending processes to be transparent and facilitated digitally, documentation to be stored and secure in the cloud, and communications to rely on text and email.

The Sector's COVID-19 Response Points the Way

The banking industry's uncharacteristically rapid response to COVID-19, implementing in a matter of

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weeks the digital loan and grant disbursement programs that have touched nearly every SME, commercial and corporate client, has "exposed" what is possible and is now expected.

While business customers of all sizes are demanding the enhanced services facilitated by digitalized operations, many banks have been slow to translate the power of digital into their existing technology, capabilities or culture. Time is running short, though, as "fintech" companies and other competitors have increased mind share and are positioned to step into the commercial lending space should traditional banks fail to meet expectations.

Banks will want to incorporate such concepts as digital lead generation and sales enablement - not just for consumer clients and prospects but for commercial business as well. This means that banks will want to upgrade their technological look and feel and rely upon subject matter expertise and content-rich mediums, including webinars, blogging, whitepapers, etc. All of these mediums will funnel into digital lead generation when a prospective client performs its own outreach to find a new banking partner.

New Paradigm Requires New Skills

Matching the buyer's digital fluency and service requirements, the characteristic personnel needed to serve clients may be changing, too. The suave, business-savvy client development bank professional of the past is out of place in this new process-accelerated digital environment. Credit competent, responsive, client-centric, service-oriented individuals fit this new model. Further, banks will want to invest in digital marketing know-how, including content writers and SEO experts to attract potential customers into the bank's funnel.

Does this food for thought translate to your institution's talent management plans for the future? Keep in mind, the oldest Millennial is now 40 years of age and may prefer video games to golf. It's not to suggest that the days of "wining and dining" a prospect are completely a thing of the past, it just may occur at a Starbuck's and clearly is not the only way to attract business.

Digitization enables banks to gain valuable, timely insights into operations, customers and markets; you will need to put the "right people" in place to effectively execute the plan. If this article does not cause you to think twice about how you staff and go to market, you might do well to remember what happened to the dinosaurs.

Have questions about talent acquisition or compensation? Don't hesitate to connect with the author, Jay Meschke, at 816.945.5500 or jmeschke@eflassociates.com.

Additional Online Resources

COVID-19 Recovery Resources

Main Street Index
COVID-19 Impacts & Recovery
Our most recent survey in February 2021 polled respondents on COVID-19's impact on their business and their recovery.

Articles by Business Need
Tax, legislative, employees, HR, financial management, risk, operations

Executive Insights On-Demand Webinars
In-depth insights to help your organization and your commercial customers mitigate the impact of COVID-19 on employees and operations.

Podcasts

What's Going on with the Employee Retention Tax Credit?
Bill Smith and Nate Smith talk with Mark Waxman (30 minutes)

How COVID-19 Affects Future Enterprise Risk Planning
Mike Gallagher (Risk Advisory) and Mike Garguilo (Insurance Services) insights about what adjustments could be made to risk strategies.

Featured Content Webinars

Vaccines & the Return to the Office – a Workplace Outlook
[on demand webinar] - our experts address employers' most pressing and crucial questions about the vaccine and its impacts on the return to the workplace, employer liability and workers' comp.

Q1 Quarterly Economic and Market Review [live webinar]
April 28 | 1-2 pm CDT
In this webinar we will review Q1 2021, and discuss periodic stock market updates and investment insights and opportunities to give you a better understanding and help you plan for the year ahead.

Retirement Plan Document Restatement- What You Need to Know

BY **CBIZ RETIREMENT PLAN SERVICES**

Every six years, the IRS requires pre-approved (formally known as prototype or volume-submitter) qualified retirement plan documents to be "restated" to update the document for previous IRS-required interim amendments and any other language the IRS chooses to include. There is no longer a requirement to periodically restate plan documents that are not pre-approved, known as individually designed documents, every five-years; however such documents must be amended to reflect new laws and regulations. This article will focus on the current six-year restatement "cycle" of pre-approved documents for qualified defined contribution plans (401(k), profit sharing, etc.). Please note that 403(b) plans are technically not included in this group and have their own six-year restatement cycle.

The IRS issued approval letters to the various defined contribution plan document providers during the summer of 2020, signaling the end of its approval process and the beginning of a new two-year restatement window, with the requirement that the plan documents be restated by July 31, 2022. This restatement cycle is referenced throughout the industry as a "Cycle 3" restatement. Items incorporated in this restatement include, but are not limited to, an updated definition of spouse, the ability to use forfeiture monies to offset additional types of employer contributions (such as safe harbor), the ability to amend a safe harbor plan mid-year and permitting in-plan Roth conversions.

If your defined contribution plan is currently on a pre-approved document, your provider should reach out to you soon, if not already. While July 31, 2022 may seem like a long way away, it will arrive more quickly than we think, and there are a lot of documents requiring restatement.

Now may be a good time to review your plan since it must be restated anyway. Are there provisions that are not working well that you would like to change or eliminate (to the extent permitted)? Does your plan provide for flexibility, where applicable, that may prove helpful in future

years? Would you like to find ways to help improve non-discrimination testing? These are some of the discussion items to have with your document provider or consultant.

The restatement period is now upon us. Consider using this opportunity to find new ways to enhance your plan.

More Information

To learn more about plan document restatements and/or next steps, please visit www.cbiz.com/retirement.

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UDAAP: A new standard for consumer compliance protection in banks

BY **VICTOR T. SAMUEL, ESQ.**

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) prohibits conduct that constitutes an unfair, deceptive or abusive act or practice (UDAAP). Under federal law, an act or practice is considered unfair when the act or practice causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers, and the injury is not outweighed by countervailing benefits to consumers or to competition. A "substantial injury" generally is defined as a monetary harm that is usually a result of additional fees, costs or other financial loss due to the unfair act but need not always be monetary.

On March 11, 2021, under the Biden administration, the Consumer Financial Protection Bureau (CFPB) redefined the interpretation of the "abusiveness" standard of UDAAP by rescinding the prior administration's 2020 order that had greatly reduced the enforcement of abusive practices in conjunction with other facets of UDAAP.

How we got here and what it means

An act or practice is considered deceptive under Dodd-Frank when the act or practice misleads or is likely to mislead the consumer, the consumer's interpretation is reasonable under the circumstances, and the misleading act or practice is material. Under the Act an abusive practice:

- materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service, or
- takes unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs or conditions of the product or service, and
- takes advantage of the consumer's inability to protect their interests in selecting or using a consumer financial product or service or relies on a covered person to act in the interests of the consumer.

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The "abusiveness" standard is different from the above standards as it solely concerns itself with the conduct of service providers and is indeed a congressional expansion of the CFPB's regulatory power. Additionally, the legislative record behind the Dodd-Frank Act establishes that the CFPB should construe the term "abusive" in a broad manner for the benefit of the consumers. While Donald Trump's 2016 campaign promises included cutting regulation and his transition team suggested that Trump would dismantle the Dodd-Frank Act, the reality of his presidency has been less than fatal to the Act and its UDAAP provisions.

On April 20, 2018, the CFPB settled with Wells Fargo, a large national bank, for violations of Title X of the Dodd-Frank Act's UDAAP prohibition with one of the largest fines imposed in the Bureau's history. The Bureau found that Wells Fargo was in non-compliance of the mortgage-interest-rate-lock process and operated its Force-Placed Insurance program in an unfair manner, and that disclosures to some borrowers were inadequate. Wells Fargo unfairly failed to follow its mortgage-interest-rate-lock process when it inconsistently applied its extension fee, causing the borrower to pay fees that should have been absorbed by the lender, even in circumstances where the Bank had requested the extension. Wells Fargo engaged in the charging of fees, which caused monetary harm and loss for its consumers. Fees were assessed inconsistently and even when the Bank itself was responsible as per its explanation to its own clients, the consumers would have no reasonable way of avoiding such a fee. Additionally, within days of unveiling its policy in 2013, Wells Fargo acknowledged its guidelines for its loan officers were inadequate in an internal correspondence without amending its guidelines to account for the inadequacy. If Wells Fargo wished to mitigate its culpability, the bank should have immediately redressed the inadequacy by amending the guidelines. Likewise, there simply was no benefit to the consumer, thus rendering it unfair under the UDAAP provision. CFPB, in its joint action with the Office of the Comptroller of the Currency (OCC), assessed a $1 billion penalty against the bank.

During the Obama administration, the Bureau rarely pursued its enforcement actions against banks in federal court. As a matter of course, bank oversight occurred in the Bureau's administrative proceedings as opposed to in court before a federal judge. In fact, only one such instance occurred during the Obama administration in a case filed in federal court in Minnesota. Regulation through litigation was the norm under the Trump administration's leadership.

In 2016, the CFPB found that Citibank N.A. had engaged in abusive practices in violation of Dodd Frank's UDAAP provision. Citibank had undertaken a scheme of selling credit card debt with inflated interest rates to debt buyers, which materially interfered with the consumer's ability to understand a condition of the debt and took advantage of that inability to understand the rates of the debts as they truly were for the bank's own profit. Such a practice led to the continued collection of debts on accounts that had since, in fact, been fully paid off. Furthermore, Citibank had utilized documents to alter court documents in furtherance of its scheme.

Additionally, despite now former Director Mulvaney's statement that the CFPB would no longer "push the envelope" in terms of advancing novel theories of law or relying on broad UDAAP theories, the Bureau did just that. In its October 2018 consent order with Bluestem Companies, the CFPB, even under the Trump administration, pursued new theories in the application of UDAAP to hold one party liable for its omission for the harmful action of another, such as a bank's liability for its actions or omissions that assisted in the misconduct by debt buyers.

The Bureau found that Bluestem unfairly delayed the forwarding of 18,000 payments for a period of 31 days with 3,500 of these payments being delayed for more than a year. Such delays were found to have likely subjected its customers to misleading activity by debt collectors and collections agency, which may have included accounts that customers had already paid off. As the delay was purely the fault of the company, there was little that any consumer could do to avoid the issue. Likewise, there was no benefit to the consumer whatsoever. As a condition of their consent order, Bluestem was not only ordered to improve their processes and remedy the issue that caused the delay but also to pay a civil penalty of $200,000 dollars.

On Jan. 24, 2020, the CFPB announced that the Bureau intended to avoid permitting the use of the same or nearly the same facts for both abusiveness and unfairness or deception violations also known as "dual pleading." The Bureau announced it also would only seek to obtain monetary relief for abusiveness when a lack of good faith effort to comply with the law had been proven, except in the case of injured consumers for whom restitution would be sought regardless of how a company acted.

This recent policy, however, was rescinded just over a year later on March 11, 2021 under the new Biden Administration. This Biden-era policy now permits the Bureau to once again use the same set of facts that was previously used to plead a UDAAP violation under an unfairness or deception standard, as well as under an abusiveness claim. The policy has wide implications regarding the viability of abusiveness claims. From

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the inception of the Bureau until June 2019, only four of the 31 UDAAP claims with abusiveness claims also possessed standalone abusiveness claims. Of those claims, only one claim relied solely on its abusiveness claim. Thus, the remaining 27 UDAAP claims that contained abusiveness claims in addition to a deceptiveness or unfairness claim would have had abusiveness stricken from their claim under the general policy to avoid double pleading had they been brought under the duration of the 2020 Trump-era policy. For further context, had the 2020 policy been in effect since the Bureau's inception, it would have affected the viability in part of around 12% of the 222 enforcement cases brought by the Bureau.

Implications of this change in interpretation

For banks and financial services firms seeking to avoid enforcement actions by the Bureau, it is incumbent on the institution in question that they act, first, to prevent circumstances from which such actions could arise. While the majority of enforcement actions arise from non-compliance with or violation of the Bank Secrecy Act or Section Five of the Federal Trade Commission Act, which forbids unfair, deceptive acts or practices, any financial institution interested in keeping itself immunized from UDAAP violations can benefit from continually reviewing regulations as they are updated regularly for the purpose of remaining in compliance with any new regulations.

Diligence in detecting and remediating potentially unfair, deceptive, abusive acts or practices that become problems is critical in ensuring that such risks do not blossom into full-scale enforcement actions. This can be accomplished by seeking the services of subject matter experts to conduct regular UDAAP reviews to identify potential non-compliant acts or practices. Such a review will assess the risk of an institution's compliance risk and management systems, from internal controls to procedures, for avoiding UDAAP violations. Brochures, advertisements, call-center scripts, sales communications and any other documents used by the institution would similarly be assessed, as even inadequate guidelines given to employees, such as loan officers as seen with Wells Fargo, could result in findings of UDAAP non-compliance. This review process is instrumental in highlighting potentially non-compliant behavior and ensuring its correction prior to incidents occurring that would rise to the notice of regulatory agencies such as the CFPB.

In spite of Trump's anti-regulatory stance, the Bureau continued to break new ground in terms of legal theory and pursued oversight in federal court at a higher rate than the previous administration. UDAAP as a legal standard is vague and relatively fluid; its requirements shift in conjunction with the relative sophistication of consumers and the complexity of financial products and services that they consume. In-house compliance officers and independent audit leadership will need to stay on guard throughout the entire product and service life cycle and work with their business partners. They must review customer disclosures and provide guidelines to front-line staff to ensure that all communication to customers and staff are clear and unambiguous. It is imperative that banks and financial firms vigilantly audit and keep abreast of regulatory changes and changing levels of sophistication with products and consumers to ensure that the institutions remain in compliance with UDAAP.

For additional information on regulatory and compliance issues affecting financial institutions, connect with Remonde Brangman, Managing Director in the CBIZ Risk & Advisory practice. Remonde can be reached at 540.687.0406 and rbrangman@cbiz.com.